to it. And also with the exception of the few cases that adhere to the doctrine of absolute conclusiveness is directly contrary to the weight of authority.[8]

The view taken in the instant case therefore has very little support and loses sight of the fact that the constitution has the power to provide in what manner and mode bills shall become laws and that that solemn instrument is the evidence of the supreme will of the people. Therefore when the constitution does provide certain requisites and the way that such requisites shall be evidenced it surely seems that they should be complied with or the bill does not become a law. This proposition is fundamental and is not lost sight of in those cases which hold that where a certain matter relative to the passage of the bill must be entered on the journal the bill is a nullity unless it is so entered.[9]

The only reasons for adopting the doctrine of absolute conclusiveness as done by the New Mexico court in the instant case are ones of convenience and perhaps public policy, as any other view would necessitate a person making an exhaustive search through the journals in order to determine whether or not a statute which gives him certain rights and is properly certified by the speaker of the House, the president of the Senate, and approved by the Governor, is really a valid act of the legislature and one on which it would be safe to rely. But demands of convenience and so-called public policy are not valid excuses for disregarding the demands of the Constitution of a State.

ADMISSIBILITY OF EVIDENCE AS TO UNCHASTITY OF ALLEGED VICTIM OF RAPE TO SHOW PROBABILITY OF CONSENT.—In the oft quoted words of Lord Hale, "An accusation for rape is one easily made, hard to be proved, and still harder to be defended by one ever so innocent." [1] The defense most frequently made is that the prosecutrix consented to the act. Since the act is almost invariably performed with the greatest possible secrecy, and never in the presence of a third person, the defendant must necessarily rely almost entirely upon circumstantial evidence to establish this defense. Since it is much more probable that a woman already guilty of indulgence in illicit sexual intercourse will consent to the act than a virgin of uncontaminated purity, it is clear that previous unchastity of the prosecutrix is a circumstance of the highest probative value on the question of consent.[2] But how may such lack of chastity be proved?

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[8] See note 2, *supra*.

[9] See note 2, *supra*.

[1] 1 Hale, P. C. 635.

[2] "It would be absurd, and shock our sense of truth, for any man to affirm that there was not a much greater probability in favor of the proposition that a common prostitute had yielded her assent to sexual intercourse than in the case of a virgin of uncontaminated purity. All will readily assent to the proposition that she who followed prostitution as a trade would not be so likely to depart from her degraded habit, and resist an offer for indulgence of illicit vice, as would the woman of perfect purity, whose every instinct would prompt her to revolt at

It is well settled that general evidence of the unchaste character of the prosecutrix is admissible to show probability of consent.[3] And for this purpose it may be shown that she was a common prostitute,[4] or was generally reputed to be of unchaste character.[5] But evidence of her general reputation for chastity must be confined to her reputation as it existed prior to the commission of the act for which the prisoner is on trial, since it is her unchaste character at the time the act was committed and not at the time of the trial which would raise an inference that she consented to the act.[6]

It is likewise well settled that evidence of previous specific acts of intercourse with the prisoner is admissible.[7] And this is much stronger than mere evidence that the prosecutrix was of unchaste character, since it shows her immoral emotion toward the prisoner himself.[8]

But as to the admissibility of evidence of particular acts of intercourse between the prosecutrix and other men than the prisoner there is a great conflict in the authorities. In England the question first came before the courts in the early case of *Rex* v. *Hodgson,*[9] which held that such evidence is inadmissible. The contrary was held in a later case;[10] but this later case has in turn been overruled in a still later one.[11] In this country probably the majority of the cases follow the rule laid down in *Rex* v. *Hodgson;*[12] but there are many cases holding that such evidence is admissible.[13] As previously shown, such evidence is clearly relevant.[14] The argument most frequently advanced against its admissibility is that while

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the thought of such a liberty." Titus *v.* State, 7 Baxt. (Tenn.) 132, 133. See also People *v.* Abbot, 19 Wend (N. Y.) 192, 196, Cowen, J.: "* * * no court can overrule the law of human nature, which declares that one who has already started on the road of prostitution, would be less reluctant to pursue her way, than another who yet remains at her home of innocence and looks upon such a career with horror."

[3] Regina *v.* Clay, 5 Cox C. C. 146; Woods *v.* People, 55 N. Y. 515, 14 Am. Rep. 309; Seals *v.* State, 114 Ga. 518, 40 S. E. 731, 88 Am. St. Rep. 33; State *v.* Verto, 65 W. Va. 628, 64 S. E. 1025.

[4] Regina *v.* Clay, *supra;* Woods *v.* People, *supra.*

[5] State *v.* Verto, *supra.*

[6] State *v.* Forshner, 43 N. H. 89, 80 Am. Dec. 132. See also Pratt *v.* State, 19 Ohio St. 277; State *v.* Ward, 73 Iowa 532, 35 N. W. 617.

[7] Rex *v.* Martin, 6 Carr. & P. 562, 25 Eng. Com. L. 544; 1 Wigmore, Evidence, § 200. See also McQuirk *v.* State, 84 Ala. 435, 4 South. 775, 5 Am. St. Rep. 381; Rice *v.* State, 35 Fla. 236, 17 South. 286, 48 Am. St. Rep. 245.

[8] 1 Wigmore, Evidence, § 200. [9] Russ. & R. C. C. 211.

[10] Regina *v.* Robins, 1 Cox C. C. 55, 2 Moo. & Rob. 512.

[11] Regina *v.* Cockroft, 11 Cox C. C. 410.

[12] McDermott *v.* State, 13 Ohio St. 332, 82 Am. Dec. 444; Commonwealth *v.* Harris, 131 Mass. 336; Rice *v.* State, *supra;* Black *v.* State, 119 Ga. 746, 47 S. E. 370. See People *v.* McLean, 71 Mich. 309, 38 N. W. 917, 15 Am. St. Rep. 263.

[13] Benstine *v.* State, 2 Lea (Tenn.) 169, 31 Am. Rep. 593; Titus *v.* State, *supra;* People *v.* Benson, 6 Cal. 221, 65 Am. Dec. 506; State *v.* Johnson, 28 Vt. 512. See People *v.* Abbot, *supra.*

[14] See note 2, *supra.*

the prosecutrix may be expected to defend her character in respect to chastity against general evidence, she is unprepared to do so as to specific acts of unchastity.[15] On the other hand it is argued that the interests of a prisoner on trial for a capital offense are entitled to much more protection than those of the prosecutrix, a mere witness whose life and liberty are not in jeopardy, and that since this evidence is often the strongest available to the prisoner with which to establish his only defense, he should not be deprived of it merely on the ground of unfair surprise.[16]

Much of the confusion in the cases seems to have arisen out of a failure to distinguish between evidence introduced to impeach the character of the witness for truth and that introduced to establish the chief defense, viz.: consent. As a rule only general evidence can be introduced for the purposes of impeaching the credibility of a witness, since this is a mere collateral issue;[17] but this rule is clearly inapplicable when the character of the witness alleged to be the victim of the crime is a circumstance strongly relevant to *the main point directly in issue.*[18]

This confusion seems to have been added to by a failure to clearly distinguish between character and reputation. "Character" signifies the peculiar qualities impressed by nature of habit on a person; while "reputation" signifies the qualities which he is supposed to possess.[19] The fact that a woman has been guilty of particular acts of illicit sexual intercourse does not necessarily show that she is *reputed* to be unchaste, but it does show that she was really of unchaste *character,* and the latter fact will naturally raise the stronger inference of consent. However, that a woman is reputed to be unchaste is some evidence that she is so in fact.[20]

It is interesting to note that most of the cases supporting the view that evidence as to specific acts of unchastity with third persons is admissible are based on reason and principle, while most of those opposed to this view are content to merely follow the greater number of precedents, and many of the cases they cite as precedents are clearly dicta. In the recent case of *Lee* v. *State* (Tenn.), 179 S. W. 145, the Supreme Court of Tennessee considered it its duty where the cases are in conflict to follow the sounder reason rather than the greater number of decisions, and held that such evidence is admissible. It would seem that this decision is clearly in accordance with the better view on reason and principle. When it comes

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[15] See McDermott *v.* State, *supra;* State *v.* Ogden, 39 Oreg. 195, 65 Pac. 449.

[16] See People *v.* Abbot, *supra;* People *v.* Benson, *supra;* Benstine *v.* State, *supra.*

[17] Greenleaf, Evidence, 16 ed., § 461b; 2 Wigmore, Evidence, § 979.

[18] See People *v.* Abbot, *supra;* State *v.* Johnson, *supra;* 1 Wigmore, Evidence, § 200. And for the same reason it would seem erroneous to confine such testimony to the cross-examination of the prosecutrix.

[19] Andre *v.* State, 5 Iowa 389, 68 Am. Dec. 708. See Harrison *v.* Lakenan, 189 Mo. 581, 88 S. W. 53; State *v.* Dickerson, 77 Ohio St. 34, 82 N. E. 969, 13 L. R. A. (N. S.) 341.

[20] 2 Wigmore, Evidence, § 920.

to a choice between the evil of mere collateral inconvenience and that of depriving one on trial for a capital offense, whose chief defense is necessarily provable only by circumstantial evidence, of the strongest circumstance sustaining that defense, it is hard to see how a court of justice can have the least hesitation in deciding which is the greater evil.

PRESUMPTION OF THE TIME OF THE DEATH OF ONE PRESUMED TO BE DEAD AFTER ABSENCE OF SEVEN YEARS.—At what time death is legally presumed to have occurred, as is true in many questions of evidence, has produced irreconcilable and acknowledged conflict among the authorities. The English courts with their customary consistency and conservatism have adopted one rule which is followed in America by some cases. On the other hand at least two other extreme and opposite doctrines encumber the American courts. The whole doctrine of presuming one dead after a continued absence unheard of for seven years, arose from two early Acts of Parliament; the first (1603) [1] provided an exemption from prosecution for bigamy to one who married a second time, his or her spouse having been absent for seven years; the second (1667) [2] enacted that in regard to certain titles to land one should be accounted dead who had been absent for a like period. By analogy drawn from these statutes the presumption of death has been applied in all cases both civil and criminal to such an extent, that for a long time it has been regarded as a fundamental principle of the common law, though in many states it is specifically covered by statute.[3]

Early cases in England said that a person once shown to be living was by law presumed to continue so until his death was proved or overcome by the conflicting presumption of death after an absence of seven years. At the expiration of this period a presumption of law arises that the person is dead but none as to the time at which death actually occurred and one whose right of recovery depends upon the establishment of death at, prior to, or subsequent to a particular time, must do so by evidence of some sort.[4] In other words it was established as law: First, that the law presumes a person who has not been heard of for seven years to be dead, but in the absence of special circumstances draws no presumption from that fact as to the particular period at which he died. Secondly, that a person alive at a certain period of time is to be presumed to be alive at the expiration of any reasonable period afterwards.

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[1] 1 Jac. I, c. 11, s. 2. [2] 19 Car. 2, c. 6.

[3] The statutory period in some states is fixed for a less time than seven years. See People *v.* Feilen, 58 Cal. 224. While if there is no period fixed by statute the court will adopt the period assumed by the English judges, viz., seven years. Burr *v.* Sim, 4 Whart. (Pa.), 150, 33 Am. Dec. 50. Fixed by statute in Virginia. Evans *v.* Stewart, 81 Va. 724.

[4] Doe ex. dem. Knight *v.* Nepean, 5 Barn. & Ad. 86, 27 C. L. R. 42; Nepean *v.* Knight, 2 Mess. & W. 984, 8 Eng. Rul. Cas. 512.